BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

ANDREW WILLIAMS	)	
Claimant	)	
V.	)	
	)	Docket Nos. 1,072,601
TYSON PREPARED FOODS, INC.	)	1,066,804
Respondent	)	
AND	)	
	)	
TYSON FRESH MEATS, INC.	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the August 21, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein.

APPEARANCES

Matthew L. Bretz, of Hutchinson, Kansas, appeared for the claimant. P. Kelly Donley, of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from May 5, 2015, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found the accident is a direct and natural consequence of claimant's original injury in Docket No, 1,066,804. The ALJ specifically found that claimant fell due to a combination of elevated ambient temperature in the area that he was working, an accommodated position, and medications ordered in the original matter, based on restrictions issued in Docket No. 1,066,804. The ALJ ordered an independent medical examination (IME) with Dr. Hufford to determine treatment recommendations for claimant's hip.

Respondent appeals, arguing the ALJ lacked jurisdiction to grant benefits in the form of an IME for the hip after finding the hip injury was a the direct and natural consequence

of claimant's original injury in Docket No. 1,066,804, which respondent contends is not a part of this appeal. Respondent further contends the appropriate procedure was not followed leading up to the preliminary hearing. Therefore, the ALJ's Order should be reversed.

Claimant did not file a brief.

FINDINGS OF FACT

At the preliminary hearing, the ALJ confirmed, and both parties agreed, that the preliminary hearing was for Docket Nos. 1,066,804 and 1,072,601. The ALJ also confirmed the two dockets were consolidated for preliminary hearing purposes with respect to compensability issues and treatment issues for claimant's hip.[1] Both attorneys agreed to this consolidation at the time of the preliminary hearing. However, the ALJ failed to include both docket numbers on the subsequent Order.

On June 17, 2013, claimant suffered injury arising out of and in the course of his employment with respondent, which ultimately resulted in the amputation of his right arm below the elbow. Claimant was provided extensive treatment and was able to return to work for respondent in an accommodated position.

On January 16, 2015, while working in an accommodated position, claimant suffered injury to his right hip. Claimant indicated his hip was injured after he lost consciousness from being exposed to too much heat over the course of three days. Claimant testified he was not supposed to be around excessive heat or cold because of medication he takes related to his prior injury. Clamant testified that when he questioned the light duty assignment and the heat, he was told to a cold location to compensate for the excessive heat. However, in his opinion, that would make the situation worse, going from hot to cold and back to hot. When claimant told his supervisor of the heat problem, he was told the supervisor would call "up front" to see if they could find somewhere to put claimant to accommodate his work restrictions and work environment. However, no change was made.

On the date he passed out, claimant was transported by ambulance to the Hutchinson Regional Medical Center emergency room where he complained of head, neck, low back and abdomen pain, with numbness bilaterally into his great toes. At the preliminary hearing, claimant complained of pain in the lower right hip and down his right leg and into his foot. Claimant testified his right foot is numb and stays cold. Claimant testified he was told at the emergency room that he fainted due to a combination of the excessive heat and the medications he was taking from his original arm injury.

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[1] P.H. Trans. (May 5, 2015) at 4.

Claimant's medications, listed in Claimant's Exhibit No. 1 to the preliminary hearing, include six separate prescription medications. Claimant testified all six medications were being taken as the result of his earlier injury and resulting arm amputation.

Respondent's appeal of the preliminary hearing order disputes whether claimant sustained personal injury by accident arising out of and in the course of his employment. In its brief to the Board, respondent further disputes the ALJ's Order, contending the ALJ exceeded his jurisdiction by entering an Order authorizing medical treatment in Docket No. 1,066,804 when the preliminary hearing involved only Docket No. 1,072,601. Respondent also contends the appropriate hearing process contained in K.S.A. 44-534a was not followed.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-501b(b)(c) states:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(d) states:

> (d) "Accident'' means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident'' shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f)(1)(2)(B) states:

> (f)(1) "Personal injury'' and "injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
> (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor.

> An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
> . . .
> (B) An injury by accident shall be deemed to arise out of employment only if:
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

> (g) "Prevailing'' as it relates to the term "factor'' means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant suffered an original injury on June 17, 2013, which ultimately led to the amputation of his right arm below the elbow. As an accommodation, claimant was told to pick up taco shell pieces off the floor. This work created problems for claimant and he was moved to another accommodated job counting taco shells near the ovens. This area has been described as elevated in temperature. Claimant testified the heat in this area made him ill and he lost consciousness and fell, suffering injury. The ALJ determined the fall was a combination of the heat exposure and the medications claimant was taking from the amputation injury in 2013. This Board Member agrees and affirms that finding.

K.S.A. 2013 Supp. 44-534a(a) states:

> (a)(1) After an application for a hearing has been filed pursuant to K.S.A. 44-534, and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total or temporary partial disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge

> who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.
> (2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given , or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 44-534a requires that, at least seven days prior to the filing of an application for preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file the application. In Docket No. 1,066,804, the Notice of Intent was faxed to respondent's counsel on March 3, 2015. The Application for Preliminary Hearing was then filed with the Division on March 17, 2015.

In Docket No. 1,072,601, the Notice of Intent was faxed to respondent counsel on March 5, 2015. The Application for Preliminary Hearing was filed with the Division on March 18, 2015. Notice of Preliminary Hearing in both docket numbers listing May 5, 2015, as the hearing date, was mailed on March 18, 2015.

At the preliminary hearing, the ALJ listed both docket numbers and acknowledged an agreement to consolidate the two case numbers for purposes of preliminary hearing with respect to compensability issues and treatment issues for claimant's hip. Both attorneys acknowledged the consolidation agreement on the record.[2]

The Order issued by the ALJ mistakenly displayed only Docket No. 1,072,601. However the Order granted medical benefits from claimant's original injury in Docket No. 1,066,804. The failure to list both docket numbers in a case where both were clearly in dispute and both parties agreed to the consolidation of both matters appears to be a clerical error on the part of the ALJ. This matter could be remanded to the ALJ for the purpose of correcting this apparent clerical error. The general rule regarding clerical errors versus judicial errors has been discussed repeatedly by the appellate courts in Kansas.

> A *nunc pro tunc* order may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, or to supply a judicial omission, or an affirmative action which should have been, but was not, taken by the court, or to show what the court should have decided, or intended to decide, as distinguished from what it actually did decide. The power of the court is limited to making the journal entry speak the truth by correcting clerical errors arising from oversight or omission and it does not extend beyond such function.[3]

The application of the nunc pro tunc order to correct judicial errors in workers compensation matters has also long been an accepted practice. As noted in *Norcross,*[4]

> . . . a judgment as entered is one thing and the judgment as recorded may be quite a different thing. Because of error the record of the judgment may not be correct. In such case a trial court not only has the right but the duty to make the record speak the truth. This duty of the court is inherent and does not depend on rules of procedure or lack of them. (Citation Omitted)
>
> The change in the record to make it speak the truth may be accomplished by an order *nunc pro tunc*. The function of such an order is to correct the record of a judgment by entering, now for then, an order previously made.

Having so found, the Board also notes that it has *de novo* review of the decision of the ALJ. As such, a remand of this matter to correct a simple clerical error would not serve the purposes of judicial economy and would only delay a claimant's right to medical treatment for a work-related injury. Therefore, this Board Member finds the Order of the

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[2] P.H. Trans. (May 5, 2015) at 4.

[3] *In re Marriage of Leedy*, 279 Kan. 311, 109 P.3d 1130 (2005).

[4] *Norcross v. Pickrell Drilling Co.*, 202 Kan. 524, 526, 449 P.2d 569 (1969).

ALJ is amended to list both docket numbers and is affirmed as to the order for an IME to determine treatment recommendations for claimant's hip in Docket No. 1,066,804.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[5] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be amended to add Docket No. 1,066,804 to the heading, but is otherwise affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated August 21, 2015, is modified as above noted and otherwise, affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2015.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
matt@byinjurylaw.com
colleen@byinjurylaw.com

P. Kelly Donley, Attorney for Respondent and its Insurance Carrier
kdonley@McDonaldTinker.com
pschweninger@mcdonaldtinker.com

Thomas Klein, Administrative Law Judge

[5] K.S.A. 2013 Supp. 44-534a.